RECEIVED
NOV 4 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 79-6806

ORIGINAL COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

D. STEPHEN MENZIES,
Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The
Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III.
Executive Assistant
Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

1. Whether the 'ifth Circuit Court of Appeals properly exercised its discretion in denying Petitioner's application for a certificate of probable cause to review his question regarding a conflict of interest by his criminal trial attorney.

TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES.	iii
OPINIONS BELOW.	1
JURISDICTION.	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	4
REASONS FOR DENYING THE WRIT.	5
I. THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION	5
II. THE FIFTH CIRCUIT COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN DENYING PETITIONER'S APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE	8
CONCLUSION.	10

TABLE OF AUTHORITIES

Cases	Page
Blankenship v. Estelle, 545 F.2d 510 (5th Cir. 1977).	7
Buffalino v. Reno, 613 F.2d 568 (5th Cir. 1980).	7
Cardinale v. Louisiana, 394 U.S. 437 (1969)	5
Coppedge v. United States, 369 U.S. 438 (1968). . .	6
Cuyler v. Sullivan, __ U.S. __, 100 S.Ct. 1708 (1980).	9
Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980).	7
Holloway v. Arkansas, 435 U.S. 475 (1978)	9
House v. Mayo, 324 U.S. 42 (1945)	2,6
In the Matter of Shuttlesworth, 369 U.S. 35 (1962)	9
In the Matter of the Application of Burwell, 350 U.S. 521 (1956)	6
Mayberry v. Davis, 608 F.2d 1070 (5th Cir. 1979).	7
McKinney v. Wainwright, 488 F.2d 28 (5th Cir. 1974), cert. denied, 416 U.S. 973 (1974).	7
Picard v. Connor, 404 U.S. 270 (1971)	8
Ramsey v. United Mine Workers, 401 U.S. 302 (1971)	7
Slayton v. Smith, 404 U.S. 270 (1971)	9
Stuckey v. Stynchcombe, 614 F.2d 75 (5th Cir. 1980).	7
Swenson v. Stidham, 409 U.S. 224 (1972)	7
Tacon v. Arizona, 410 U.S. 351 (1973)	7

Constitutions and Statutes	
U.S. Const. amend. IV	3
U.S. Const. amend. XIV.	3

28 U.S.C. §347(a) 2

28 U.S.C. §1254(1). 2

28 U.S.C. §1257(1). 2

28 U.S.C. §1651(a). 2,3,4

Sup. Ct. R. 26, 28 U.S.C. (1980). 4,5,8

Fed. R. App. P. 22(b) 6

NO. 79-6806

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

D. STEPHEN MENZIES,
Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The
Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Attorney General of Texas, on behalf of W. J. Estelle, Jr., respectfully requests that the Court deny the petition for writ of certiorari.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit denied Petitioner's pro se application for certificate of probable cause on February 28, 1980. On April 16, 1980, the Fifth Circuit denied Petitioner's second application for certificate of probable cause. Petitioner requested that a panel review his request. On May 29, 1980, the panel, consisting of Judges Ainsworth, Fay, and Randall, denied

Petitioner's application for certificate of probable cause. The Fifth Circuit's actions followed the entry of a judgment denying Petitioner's request for habeas corpus relief filed in the United States District Court for the Southern District of Texas, Houston Division, on December 29, 1979. The district court adopted the Memorandum and Recommendation of the United States Magistrate which is reproduced as Appendix A to the petition.

Petitioner also appealed his conviction to the Texas Court of Criminal Appeals on the same grounds he raised in federal district court. That court affirmed Petitioner's conviction in an unpublished per curiam opinion delivered November 15, 1978 (attached to Petitioner's petition at A-14).

JURISDICTION

Petitioner erroneously asserts that this Court has jurisdiction under 28 U.S.C. §1257(1). That statute governs review of state court decisions; here Petitioner seeks review of federal court decisions, which is governed by 28 U.S.C. §1254(1). But this Court may not grant the writ pursuant to §1254(1). It may only review the case, if at all, under the authority of 28 U.S.C. §1651(a). House v. Mayo, 324 U.S. 42 (1945), is absolutely clear upon this point, which significantly bears upon the appropriate standard governing this Court's decision whether to review the case. The relevant federal jurisdictional statute, now 28 U.S.C. §1254(1), formerly 28 U.S.C. §347(a), provides for review of cases "in" the Court of Appeals. As squarely held in House, 324 U.S. at 44, a case is not "in" the Court of Appeals unless a certificate of probable cause is granted.

For these reasons, the Court has jurisdiction over Petitioner's claim only under 28 U.S.C. §1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies upon the Sixth and Fourteenth Amendments to the United States Constitution in presenting his claim.

STATEMENT OF THE CASE

On August 26, 1974, Petitioner was indicted for the felony offense of rape by force and threats. On April 22, 1975, the case proceeded to trial in the 177th District Court of Harris County, Texas. Petitioner was represented by retained counsel, Mr. James Moore. A jury returned a verdict of guilty and assessed punishment at confinement for thirty years in the Texas Department of Corrections.

During the trial on the merits, Petitioner called a former employee, Ms. Sylvia Aiken, who testified that she had seen Petitioner at Denny's restaurant drinking coffee at 3:30 a.m. on the morning Petitioner allegedly raped Deborah Ann Stone, the prosecutrix. (State ROA 563). Ms. Aiken's testimony corroborated Petitioner's theory of the case and contradicted the testimony of the prosecutrix, who had tesified that she had been abducted at approximately 3:30 a.m. and had not been released until shortly before 7:00 a.m. (State ROA 285). Ms. Aiken also testified that she was quite afraid (State ROA 559), and that she had discussed her testimony with Petitioner's attorney and with the prosecutor. (State ROA 560).

On cross-examination, however, Ms. Aiken recanted her testimony and testified that she had been told what to say. (State ROA 574-75). When asked who had told her to come in and testify falsely, Ms. Aiken implicated Petitioner's wife, Petitioner's attorney, and perhaps Petitioner himself. (State ROA 575-78).

Petitioner's counsel then unsuccessfully attempted to rehabilitate his witness on redirect examination. (State ROA 579, et seq.). He then called several witnesses to negate the inference that he had suborned perjury, including Petitioner's wife, Sally Menzies; two attorneys who worked with Mr. Moore, Mr. Michael Eheman and Mr. John Hellums; and Mr. Moore's secretary, Ms. Wanda Taylor. These witnesses testified that Ms. Aiken had neither told them nor had they heard her tell anyone that the prior statement about seeing Petitioner at Denny's was not the truth. Petitioner also testified that Ms. Aiken had approached him and told him that she had seen him at Denny's. (State ROA 641). Petitioner now directs his complaints to this testimony.

SUMMARY OF ARGUMENT

Petitioner has failed to meet the requirements of Sup. Ct. R. 26, 28 U.S.C. (1980), governing issuance of extraordinary writs under 28 U.S.C. §1651(a), the only jurisdictional statute applicable to his case. He has not shown that granting his writ would aid the appellate court's jurisdiction, or that there are exceptional circumstances warranting the Court's review, or that adequate relief is unavailable in another forum. The Court should therefore deny Petitioner's application for writ of certiorari.

Alternatively, the Court of Appeals properly exercised its discretionary power and properly declined to grant Petitioner's application for a certificate of probable cause. The Court of Appeals properly viewed his complaint as being entirely without merit, as had the district court, because it did not reasonably appear that the sequence of events at his trial, although admittedly unusual, could possibly have diminished his counsel's loyalty to Petitioner.

On the contrary, the recanting alibi witness strengthened the mutuality of interest between Petitioner and his counsel.

No claim other than the alleged conflict of interest has been properly raised and presented throughout the state and federal proceedings. Thus, even if the Fifth Circuit abused its discretion, in denying Petitioner a certificate of probable cause, relief should be directed to the district court and Petitioner should be required to exhaust state remedies on the newly raised claim he now seeks to present.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Sup. Ct. R. 26, 28 U.S.C. (1980), provides:

> The issuance by this Court of any extraordinary writ authorized by 28 U.S.C. §1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court.

Petitioner has failed to show reasons sufficient to meet the above standard, and none exist.

First, no exceptional circumstances warrant the Court's exercise of its discretion. Petitioner has not shown or even suggested that the jury argument by the prosecutor was the product of a wide-spread prosecutorial policy. In fact, the prosecutor's jury argument was the unique result of a particular trial based on the particular testimony from that trial. No exceptional circumstances exist.

Second, Petitioner has not shown that granting his writ would aid the Court's appellate jurisdiction. The Court has established that it has the power to review the denial of

certificates of probable cause. House v. Mayo, 324 U.S. 42 (1945). In addition, this Court has left the procedures governing the determination whether to grant an application for certificate of probable cause to the Courts of Appeals. In the Matter of the Application of Burwell, 350 U.S. 521 (1956). This Court has not firmly set the standard that should be used by the Courts of Appeals in determining whether to grant a certificate of probable cause. But accepting for purposes of argument Petitioner's assertion that "the standard contemplated by [Fed.R.App.P. 22(b)], and the standard recognized in practice by the Courts of Appeals, ... is whether the applicant 'seeks appellate review of any issue not frivolous'" (Petitioner's Brief at 14, quoting Coppedge v. United States, 369 U.S. 438, 445 (1968), Petitioner raises no issue requiring this Court's attention. Petitioner, that is, concedes the existence of a Fifth Circuit standard very favorable to him and to others similarly situated. He complains that an admittedly proper standard was misapplied in his particular case. obviously this complaint suggests no matter that the Court should review.

Third, Petitioner has not shown that adequate relief cannot be had in any other court. In the district court Petitioner claimed solely that Ms. Aiken's testimony created a conflict of interest which deprived him of effective assistance of counsel. He raised only the effective assistance of counsel point in his first motion for leave to appeal. Petitioner first raised his due process allegations in his Second Application For Certificate of Probable Cause in the Fifth Circuit. In that application the Petitioner admitted:

> Thus far, unfortunately, the questions have been framed within the rubic of a "conflict of interest" between Petitioner and his trial counsel, leading to the superficially appealing conclusion that, because their interests in attacking the witness's testimony were not antagonistic, there was no constitutional violation. This conceptualization of the problem, and the solution it suggests, has obscured if not totally obliterated entirely a much more basic point: Petitioner's trial was fundamentally unfair. . .

(Petitioner's Second Application For Certificate of Probable Cause And Leave To Appeal In Forma Pauperis at 14).

The Fifth Circuit has consistently refused to review habeas corpus claims not properly raised and decided in both the state and federal courts. E.g., Stuckey v. Stynchcombe, 614 F.2d 75 (5th Cir. 1980); Buffalino v. Reno, 613 F.2d 568 (5th Cir. 1980); Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980); Mayberry v. Davis, 608 F.2d 1070 (5th Cir. 1979); Blankenship v. Estelle, 545 F.2d 510 (5th Cir. 1977); cert. denied, __ U.S. __, 100 S.Ct. 115 (1979); McKinney v. Wainwright, 488 F.2d 28 (5th Cir.), cert. denied, 416 U.S. 973 (1974). Similarly, this Court normally refuses to consider arguments that have not been raised in the lower courts. Tacon v. Arizona, 410 U.S. 351 (1973); Ramsey v. United Mine Workers, 401 U.S. 302 (1971); Cardinale v. Louisiana, 394 U.S. 437 (1969). It is not the Court's function to deal with an issue in the first instance. Swenson v. Stidham, 409 U.S. 224, 231 (1972). Petitioner may apply for relief in the courts below and raise the due process issue he seeks to raise in this court. Petitioner has not shown that relief is unavailable in the lower federal courts.

Fourth, Petitioner has not shown that relief is unavailable in the Texas courts. On his appeal to the Texas Court of Criminal Appeals, Petitioner raised solely the ineffective assistance of counsel issue in that court. He has not filed

any state writs for habeas corpus relief. In Picard v. Connor, 404 U.S. 270, 275-76 (1971) this Court stated:

> We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent 'unnecessary conflict between courts equally bound to guard and protect the rights secured by the Constitution,' . . . [citations omitted], it is not sufficient merely that the federal habeas corpus applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts.

Petitioner should be required, as a matter of federal-state comity, to present the same factual claims and legal theories in both the state and federal courts to properly exhaust his state remedies under 28 U.S.C. §2254. Since Petitioner has never presented his due process theory in the state courts, habeas corpus relief remains available. Thus, Petitioner has not shown that adequate relief cannot be had in any other forum as required under Sup. Ct. R. 26, 28 U.S.C. (1980).

II. THE FIFTH CIRCUIT COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN DENYING PETITIONER'S APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE.

In addition to the fact that Petitioner fails to meet the requisites of Rule 26 of this Court, the Fifth Circuit properly exercised its discretion in denying Petitioner's application for certificate of probable cause. The Texas Court of Criminal Appeals and the federal magistrate correctly concluded that Petitioner's interest was in discrediting Ms. Aiken's story. Thus, the interests of Petitioner and counsel were convergent, rather than in conflict, and counsel's efforts to discredit Ms. Aiken therefore constituted effective rather then ineffective representation. It cannot reasonably be argued that any attorney would have undertaken any action even slightly different from that undertaken in fact by Petitioner's trial counsel: an all-out attack on the credibility of Ms. Aiken.

This Court has recently held that in order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Cuyler v. Sullivan, __ U.S. __, 100 S.Ct. 1708, 1718 (1980). See also, Holloway v. Arkansas, 435 U.S. 475 (1978). Manifestly, Petitioner has failed to meet this burden. For that reason, any appeal would be frivolous.

If this Court nevertheless believes that the issue Petitioner raises is not frivolous and that the Fifth Circuit should have considered Petitioner's newly raised due process theory, this Court should not reach the merits of Petitioner's allegations. The record is insufficient to determine the probable effects of Ms. Aiken's recantation and subsequent rehabilitation testimony upon the jurors. A proper record, perhaps including expert testimony in this regard and conceivably the testimony of one or more jurors, should be made in the courts below and not in this Court.

In addition, if this Court decides to grant Petitioner's writ, it should treat the writ as an appeal from the district court's denial of Petitioner's application for certificate of probable cause, and remand the case to the district court with instructions to dismiss the matter while Petitioner exhausts state remedies. See, Slayton v. Smith, 404 U.S. 53 (1971); In the Matter of Shuttlesworth, 369 U.S. 35 (1962).

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, for the above reasons stated, Respondent respectfully requests that the petition for writ of certiorari be denied, or that relief be limited to remanding the case to the district court with directions to dismiss the matter while Petitioner exhausts state remedies.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

Douglas M. Becker

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT